REORGANIZATION—THE NEXT STEP: A REPLY TO MR. JAMES N. ROSENBERG[1]

In probably no branch of the law is there greater opportunity, or indeed necessity, for constructive vision and legal imagination, than in that of the reorganization of insolvent corporations. The problems which Mr. Rosenberg has outlined—how to give necessary new money a satisfactory prior lien and how to take care of the dissenters—often create serious difficulties. Two questions, from the business standpoint, they are, from the legal standpoint as presented by Mr. Rosenberg, really one—how to extinguish the claims of dissenting creditors against the property of the insolvent with something other than cash. Whoever can work out legal procedure for solving this problem will do a great service not only to the bar but also to the public, for there is a real public interest in expediting reorganizations of insolvent corporations and reducing to a minimum the period during which businesses are carried on by the courts for their owners rather than by their owners for themselves. One, therefore, hesitates to criticise adversely a proposed solution which has been matured by a member of the bar so practically experienced in reorganizations as Mr. Rosenberg. It is submitted, however, that the proposition which he has advocated is sound neither in legal theory nor in economic policy.

His thesis is that federal courts of equity today have, *without legislation*, inherent power to compel *all* creditors of an insolvent to accept in complete extinguishment of their rights against the property of the insolvent something other than cash or even than promises to pay cash in the future.[2]

The foundation for this proposition is found by Mr. Rosenberg in a dictum in the well-known *Boyd* case.[3] But the writer can find in that dictum not even the shadow of such a proposition. While the *Boyd* case has been correctly stated by Mr. Rosenberg, to resummarize will bring out more clearly what it actually decided. Boyd was, in legal effect, a creditor of the Northern Pacific *Railroad* Company. That company having defaulted in the interest on its bonds, its mortgage was foreclosed and at the foreclosure sale its property was sold to a reorganization committee for a price less than the principal amount of the bonds. The purchase was pursuant to a reorganization plan under

[1] This article by James N. Rosenberg appeared in (1922) 22 COLUMBIA LAW REV. 14.

[2] (1922) 22 COLUMBIA LAW REV. 14, 20.

[3] *Northern Pacific Railway Company* v. *Boyd* (1913) 228 U. S. 482, 33 Sup. Ct. 554.

which the stockholders were to receive stock of the reorganized Northern Pacific *Railway* Company, upon paying cash to an amount less than the par value of the new stock so to be received. The plan made no provision for unsecured creditors such as Boyd. Against the property when vested in the reorganized Northern Pacific *Railway* Company Boyd sought to enforce his claim. The Supreme Court held that the transaction constituted fraud in law as against Boyd and subjected the property to his claim. Stating the decision abstractly, it is that a plan of reorganization which admits stockholders of the debtor company to an interest in the reorganized company, even upon the payment of cash, is constructively fraudulent as against creditors if it does not make to them a fair offer of an interest in the reorganized company, and that in such a case creditors may follow the property of their debtor into the hands of the reorganized company. The actual decision was purely negative, that this reorganization was inequitable and would be disregarded as against the plaintiff. Neither the prevailing nor the dissenting opinion (the decision being by a court divided five to four) contains the slightest intimation that the courts have any affirmative control over reorganizations. It is true that the prevailing opinion in answering an objection which had been raised by counsel for the company in the argument,—that to give Boyd relief would require payment in full in cash of unsecured creditors before the potential market of the stockholders as a source for new money could be availed of—said: [4]

"This conclusion does not, as claimed, require the impossible and make it necessary to pay an unsecured creditor in cash as a condition of stockholders retaining an interest in the reorganized company. His interest can be preserved by the issuance, on equitable terms, of income bonds or preferred stock. If he declines a fair offer he is left to protect himself as any other creditor of a judgment debtor, and, having refused to come into a just reorganization, could not thereafter be heard in a court of equity to attack it."

As stated by Mr. Rosenberg, this language was merely dictum. As is usually true of dicta it was loosely spoken and was not intended accurately to define the rights of unsecured creditors. The suggestion that they might be given income bonds or preferred stock was not exclusive, but only an illustration of what might be given them under certain circumstances.

While the decision was, on first impression, something of a surprise to the bar, it is open to question whether it should have been received with any great surprise as it has been repeatedly foreshadowed in the so-called "trust fund theory" cases [5] and particularly in *Monon*

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[4] *Ibid.* 508.

[5] *Wood et al.* v. *Drummer et al.* (C. C. 1824) Fed. Cas. 17944, 30 Fed. Cas. 435; *Railroad Company* v. *Howard* (U. S. 1868) 7 Wall. 392; *Wabash, St. Louis and Pacific Ry. Co.* v. *Ham et al.* (1885) 114 U. S. 587, 5 Sup. Ct. 1081.

case [6] in 1899. It constituted but an extreme application of the doctrine, as old as the courts of chancery, that equity will not permit the exercise of a legal right when such exercise would produce an unconscionable result.[7] The bar had fallen into the habit of treating a sale in a foreclosure proceeding as something final,[8] cutting off all junior interests and permitting the senior interests who purchased at the sale to do what they would with the property, even though in advance of the sale they had made an agreement with one group of junior interests, which, as a practical matter, made possible but one purchaser and produced a result inequitable to another class of junior interests. In the light of sober second thought, it is not believed that those whose practice brought them frequently into contact with such problems, saw anything shocking in the *Boyd* case, although there remained the puzzle as to what constitutes, to use the language of the Supreme Court, a "fair offer," or "equitable terms," or a "just reorganization."

Doubtless, as Mr. Rosenberg argues, the doctrine of the *Boyd* case is not confined to unsecured creditors, but would apply equally to a class of secured creditors, which had been frozen out or inequitably treated in a reorganization plan by a senior class of secured creditors and the stockholders.[9] Query indeed whether the doctrine of the case would not even apply in favor of preferred stockholders if a plan of reorganization should be adopted by creditors and common stockholders, which sought to cut off the preferred stock and at the same time preserve an interest to the common stock?

The opinion does not, however, as Mr. Rosenberg seems to think, suggest that assent by a majority of the affected class of creditors has any binding effect upon others in that class. It is entirely silent on that question. Neither does it give to the lower federal courts any mandate to write reorganization plans for parties litigant before them.

Machinery was speedily found for settling the question as to what would constitute a "fair offer" to unsecured creditors. The first large railroad reorganization following the *Boyd* case was that of the St. Louis & San Francisco Railroad Company in 1916. In the decree for the foreclosure of the mortgage and the sale of the unmortgaged assets, following the conventional foreclosure clause, Judge Sanborn inserted the proviso:[10]

" . . . that no sale hereunder . . . shall be confirmed to any purchaser who shall purchase said property on behalf of, or for benefit

[6] *Louisville Trust Co.* v. *Louisville etc. Ry. Co.* (1899) 174 U. S. 674, 19 Sup. Ct. 827.

[7] 1 Pomeroy, *Equity Jurisprudence* (3d ed. 1905) § 51.

[8] *Pennsylvania Transportation Co.'s Appeal* (1882) 101 Pa. St. 576, and cases cited by Mr. Justice Lamar in *Boyd* case, *supra*, footnote 3, p. 503.

[9] *Guaranty Trust Company et al.* v. *Missouri Pacific Railway Co.* (D. C. 1916) 238 Fed. 812.

[10] *North American Co.* v. *St. Louis & San Francisco Railroad Co.* (D. C., E. D., Mo., E. Div., March 31, 1916) Cons. Cause Eq. No. 4174 (not reported).

of, any corporation organized, or to be organized, for the purpose or with the intention that it shall become the owner of said property, or any part thereof, or any beneficial interest therein, through any sale under this decree, pursuant to any scheme, plan or agreement whereby any stockholder or stockholders of the defendant Railroad Company shall receive any stock, bonds or other beneficial interest in such corporation on account of their stock in the defendant Railroad Company, although he or they may pay some other consideration in addition therefor, unless and until there shall have been made under or pursuant to or in connection with such scheme, plan or agreement, to [unsecured] creditors of the defendant Railroad Company . . . a fair and timely offer of cash, or a fair and timely offer of participation in such corporation through stocks, bonds or otherwise; and this Court reserves jurisdiction to determine whether such an offer to such creditors has been made under or pursuant to or in connection with any such scheme, plan or agreement, and jurisdiction to modify this decree in case it determines that no such offer has been made."

The property was purchased on behalf of the reorganization managers under a plan which gave to stockholders bonds and stock, the stock not exceeding the par value of the old stock held, upon payment in cash of an amount equal to the principal of the bonds so received. It gave to unsecured creditors 50% in preferred stock and 50% in common stock. Notice of the hearing upon the motion for confirmation of the sale was given by publication and by mail to all creditors. The court found that a fair and timely offer had been made and confirmed the sale. Thereafter various unsecured creditors commenced suits in various state courts against the new company, seeking to enforce their claims against its property upon the theory of the *Boyd* case. Upon application by the new company Judge Sanborn enjoined the continuance of these suits. Such injunctions were issued against both creditors who had proved their claims before the special master and creditors who had not come into the receivership proceedings at all.[11]

The machinery adopted in the *Frisco* case was improved upon in the Missouri Pacific reorganization which immediately followed it. There the reorganization plan was filed with the court in advance of the obtaining of the foreclosure decree, and that decree, after reciting such filing, contains the following provision:[12]

"This Court will hear complaints as to the fairness or equitableness of the offers to creditors of the defendant Railway Company made in or pursuant to said Plan, from the following persons or corporations: (1) Those who have heretofore . . . filed with the Special Master appointed herein, their claims or demands against the defendant Railway

[11] See *St. Louis-San Francisco Railway Co.* v. *McElvain* (D. C. 1918) 253 Fed. 123; *St. Louis-San Francisco Railway Co.* v. *Wall* (D. C., E. D., Mo., E. Div., July 1, 1918) Cons. Cause Eq. No. 4857 (not reported).

[12] *Guaranty Trust Co. of New York et al.* v. *Missouri Pacific Railway Co.* (D. C., E. D., Mo., E. Div., Dec. 21, 1916) Cons. Cause Eq. No. 4540 (not reported).

Company; (2) those who have heretofore asserted such claims and demands by action in any court of competent jurisdiction; (3) those who have heretofore filed intervening petitions in this . . . cause . . . and (4) those who, having a lien upon any of the property of the defendant Railway Company, by intervening petitions filed herein, with leave of Court; before the day hereinafter set for the hearing on such complaints, assert a liability of said Company for the debt secured by such lien, and this Court reserves jurisdiction to determine whether said offers as to which complaints are so made are fair and equitable, and in the event that a sale of any property hereunder is made to any purchaser who shall purchase said property . . .. for . . . any corporation organized . . . to become the owner of said property . . . pursuant to said Plan, to modify this decree in case it determines that no such offer has been made. Such complaints will be heard by this court. . . . All persons or corporations who make no complaint at the time and place aforesaid shall be barred from doing so thereafter."

General creditors received preferred stock of a par value equal to the principal amount of their claims. Stockholders received new common stock equal in par amount to their former holdings, together with certain bonds, upon making cash payment equal to the principal amount of the bonds. The sale was confirmed.[13]

In neither the *Frisco* nor the *Missouri Pacific* case did the court purport to force unwilling creditors to accept securities. Both decrees were in the conventional form and provided for the distribution among the various classes of creditors of the proceeds of sale of the assets against which they had claims.

The next large railroad reorganization was that of the Rock Island[14] and the decree entered in that case is squarely in line with the theory supported by Mr. Rosenberg. However, the problem there presented was simple, for no secured debt was involved, but only unsecured debt and stock. When the decree was entered, approximately 99½% of the stock and 95% of the unsecured debt had affirmatively assented, and there was no serious opposition from non-assentors. The decree provided for the return of the property from the receiver to the existing company without a sale, against the delivery by the existing company to its unsecured creditors of preferred stock equal in par value to the principal of their claims. It made no alternative provision for cash payment. As the preferred stock was immediately listed upon the New York Stock Exchange it was readily convertible into cash and its cash value easily ascertainable. As that cash value exceeded any amount which creditors could hope to realize by the conventional sale of the property, there was obviously no incentive for any of the small minority to litigate. The case therefore was really one of a volun-

[13] *Ibid.* Order dated March 6, 1917 (not reported).

[14] *American Steel Foundries* v. *The Chicago R. I. & Pacific Railway Co.* (D. C., N. D., Ill., E. Div., June 12, 1917). Not reported.

tary readjustment by substantially unanimous consent with the assistance of the threat of judicial sale.

The *Bijur*[15] case also, as Mr. Rosenberg has said, involved practically a consent decree.

Mr. Rosenberg is also in error in thinking[15a] that in the recent reorganization of the Chicago and Eastern Illinois Railroad the court exercised such a power as he advocates and that no cash provision was made in that case for non-assentors. The consolidated decree of foreclosure and sale entered in that proceeding May 22, 1917[15b] was in the conventional form and provided for the distribution of the proceeds of the sale of the property in accordance with the relative legal rights of the creditors. It contained a provision substantially the same as that above quoted from the Missouri Pacific decree reserving to the court jurisdiction to pass on the fairness of any offer made under a reorganization plan to creditors of any class and provided for an opportunity to such creditors to be heard upon that question. Subsequently by the decree of May 3, 1921, cited by Mr. Rosenberg in his footnote 43, the court held that the offers made to creditors by the reorganization plan were fair and in effect barred creditors, with the exception noted by Mr. Rosenberg, from attacking the reorganization as constructively fraudulent under the theory of the *Boyd* case. The court did not, however, in any way attempt to negative the right of any creditor to receive in cash his proportionate part of the proceeds of sale of the property under the May 22, 1917 decree if he elected not to come into the reorganization.

Indeed no seriously litigated case has been found where the court has held or intimated that it lies within its power to compel a creditor of any class to accept stocks or even promises to pay in the future, in full extinguishment of his claims without being afforded the alternative of receiving his proportionate share of the proceeds of the conventional sale. On the other hand in the *Chicago Railways* case,[16] Mr. Justice Brewer, sitting as a Circuit Justice in the Circuit Court of Appeals, held that however great the public interest in a reorganization, however wise a court might deem the reorganization plan, it did not lie within the

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[15] *Re Bijur Motor Lighting Co.* Not reported. Judge Martin T. Manton of the Circuit Court of Appeals for the Second Circuit sitting in the District Court.

[15a] (1922) 22 Columbia Law Rev. 23. Mr. Rosenberg's error is doubtless due to his not understanding that a conventional foreclosure decree had been entered almost four years prior to the decree cited by him in his footnote 43 and to his misinterpreting the injunction against attacking the reorganization as constructively fraudulent, as an affirmative provision requiring non-assentors to accept securities under the plan. It is believed that a confusion of these two possible remedies, which are obviously quite different in character, is the basic error in Mr. Rosenberg's entire argument.

[15b] *Railway Steel-Spring Co.; Bankers Trust Co., Trustee; Metropolitan Trust Co. of the City of New York, Trustee; Farmers' Loan & Trust Co., Trustee; Complainants* v. *Chicago and Eastern Illinois Railroad Co., et al., Defendants,* D. C., N. D. Ill., E. Div., May 22, 1917) Cons. Cause Eq. No. 57 (not reported).

[16] (C. C. A. 1907) 158 Fed. 923.

power of the court to make contracts for the parties. To quote his words:[17]

" . . . although it may believe that a party insisting upon those rights" (his strict legal rights) "is probably or even certainly, bound to suffer loss, yet while he insists it must protect him in his insistence. There is no wide discretion vested in the chancellor which permits him to disturb contract rights."

The court set aside a decree providing for a transfer of the railway properties to a new company on a basis which did not afford the possibility of cash to the holders of the old securities and which also contemplated the displacing of the lien of the old securities by a new mortgage.

In *In Re Prudential Outfitting Company*[18] a committee of creditors, in pursuance of a reorganization plan, purchased the bankrupt's property at a sale by the referee agreeing to pay therefor in cash all the costs of the administration of the estate and all priority claims and to give to general creditors preferred stock in the new company to be formed to acquire the assets equal to their claims. In setting aside the sale Judge Learned Hand said:[19]

"The case presents a question for which there is, so far as I can learn, no basis in the past precedents of this or any other court. . . . a bankruptcy court under no circumstances will, or indeed can, compel creditors to accept an aliquot interest in the assets of the bankrupt under the guise of a sale . . .

"Upon principle the question is clear. . . . there is no shadow of warrant for the idea that an interest in property may be forcibly imposed upon them [creditors] in place of money. They have the right, as they had before, to have those assets converted into money, collectively instead of separately, and nothing can invade or impair that right, unless it be by statute. It may be true that in the past, under the guise of sales, this court has compelled creditors to take deferred payments, though I think no contentious cases have got into the books upon that subject, except In re J. B. & J. M. Cornell, supra, which decides against the power. Non-contentious orders are by no means to be taken as safe precedents in such matters. That is, however, not this case, and it must await proper presentation to determine whether upon a public or private sale in bankruptcy this court has power to compel creditors to take future obligations instead of cash. Here the claims are not measured in money, present or future, for all recalcitrant creditors were forced to become stockholders in an enterprise over which they might individually have not the least power, and which they might wholly disapprove . . .

"The conventional form of reorganization does justice to dissentient creditors, and all efforts to avoid or evade it are illegal. Under it a new corporation is formed by those creditors who wish to join the plan, and

[17] *Ibid.* 927.
[18] (D. C. 1918) 250 Fed. 504.
[19] *Ibid.* 506-7.

who assign their claims to it or to their committee. This corporation or committee may then make a cash bid, which it may in part pay by allowing a proportionate credit upon the assigned claims. The dissenting creditors must be paid in cash their own proportion of the bid, which is their inviolate right. They are protected by the power of the court to fix an upset price, aided in the case of bankruptcy by the statute itself. Any admissible plasticity of reorganization lies in the court's power over that feature of the proceedings."

The decisions as to the power of the federal courts in equity to issue receiver's certificates and, under the so-called six months rule, to pay operating claims in priority to existing mortgages, upon which Mr. Rosenberg also in part relies to support his proposition, seem to the present writer to afford even less support to that proposition.

It has long been well settled that the lien of bondholders of an industrial corporation, or indeed of any but a so-called public service corporation, cannot be displaced by receiver's certificates without the express unanimous consent of the bondholders.[20] In *In Re J. B. & J. M. Cornell Company*, Judge Mayer said:[21]

"If it ever be declared that the lien of the bondholders of an industrial corporation may be displaced, without consent by a court order, the result would be that such corporations could not obtain loans from responsible institutions or investors, hence disaster and a destructive blow at legitimate business enterprises."

Mr. Rosenberg has said in substance that it needs only the receivership of a large industrial in which there is undoubted public interest to induce the courts to extend to industrial corporations the practice with respect to receiver's certificates which is followed in the cases of public utilities. Such an opportunity could not have been presented to a court in a more enticing way than in the recent case of the *Brooklyn Rapid Transit Company*[22] decided by the Circuit Court of Appeals for the Second Circuit, July 2, 1919. The Brooklyn Rapid Transit Company was originally simply a holding company, the surface lines and subway and elevated lines being owned by various companies and the power plant which supplied all of the lines being owned and operated by another company. With its corporate structure in this form it created its first refunding mortgage, which was a lien on all the securities of the operating companies held by it. Subsequently it took title to and itself operated the power plant, which it caused to be subjected to the lien of the mortgage. At the time of the appointment of receivers, both of the parent Brooklyn Rapid Transit Company and of the New York Con-

[20] *Hanna et al.* v. *State Trust Co. et al.* (C. C. A. 1895) 70 Fed. 2; *Doe* v. *Northwestern Coal etc. Co.* (C. C. 1896) 78 Fed. 62; *International Trust Co.* v. *Decker Bros.* (C. C. A. 1907) 152 Fed. 78; *In re J. B. and J. M. Cornell Co.* (D. C. 1912) 201 Fed. 381; *Lake* v. *Mudgett et al.* (C. C. A. 1918) 252 Fed. 365, 368.

[21] *Supra*, footnote 20, p. 388.

[22] *Westinghouse Electric & Mfg. Co.* v. *Brooklyn Rapid Transit Co.* (C. C. A 1919) 260 Fed. 550.

solidated Railroad Company [23] which operated the subway and elevated lines, the Brooklyn Rapid Transit Company was obligated by contract to supply power to the various lines and the contract between the Brooklyn Rapid Transit Company and the Consolidated Company had been accepted by the Public Service Commission as interim performance of the Consolidated Company's contract with the City of New York to provide power for the city owned lines. To carry out that power contract it was necessary for the Brooklyn Rapid Transit Company to build an addition to the power plant for which it was proposed to issue $5,000,000 of receiver's certificates to be given a lien upon that company's property in priority to the lien of the first refunding mortgage. In order to make possible the carrying out of the contract between the Consolidated Company (substantially all of whose stock and over $14,000,000 of whose indebtedness were owned by the Brooklyn Rapid Transit Company and pledged under the first refunding mortgage) it was proposed that the Consolidated Company's receiver should issue $13,000,000 of receiver's certificates secured by a prior lien on the property of the Consolidated Company and sell them to the Brooklyn Rapid Transit Company's receiver, who would in turn sell to the public an equal amount of his own certificates to be secured in like manner as the $5,000,000 of certificates proposed to be issued for power plant construction. The performance of the work for which the receiver's certificates were proposed to be issued was essential for the preservation of the contract between the Consolidated Company and the city and hence of the Brooklyn Rapid Transit Company's investment in the rapid transit lines. Certainly here was afforded to the court such an opportunity as Mr. Rosenberg has suggested. Although the Brooklyn Rapid Transit Company was not organized as a public utility it was engaged in a business which certainly was affected with a public interest and it would seem that the issue of receiver's certificates for the purpose mentioned might have been supported without any extension in principle of the existing decisions. The Circuit Court of Appeals held, however, that because the Brooklyn Rapid Transit Company was not engaged in business which was affected with the public interest at the time the first refunding mortgage was executed that mortgage could not be displaced by any of the proposed receiver's certificates over protest of the mortgage trustee.

The so-called "six months rule" or the rule of *Fosdick* v. *Schall* [24] is likewise confined wholly to public utility corporations,[25] and applies

[23] For the purpose of simplicity the relations between the Consolidated Company and its subsidiary, New York Municipal Railway Corporation, are disregarded.

[24] (1878) 99 U. S. 235.

[25] *Wood* v. *Guarantee Trust, etc. Co.* (1888) 128 U. S. 416, 421, 9 Sup. Ct. 131; *Bernard* v. *Union Trust Co. et al.* (C. C. A. 1908) 159 Fed. 620; *Union Trust Co.* v. *Southern Saw Mills etc. Co.* (C. C. A. 1908) 166 Fed. 193.

only to claims for materials delivered or services rendered in connection with maintenance and operation.[26] In other words it does not apply to claims on account of new construction.[27] So strictly is it limited that it has recently been held[28] in the Brooklyn Rapid Transit receivership proceedings that a contractor who built vestibules on street surface cars in order to enable the company to comply with an order of the Public Service Commission requiring vestibules, was not entitled to the benefit of the six months rule because such work constituted new construction rather than an expense of maintenance or of operation.

The new money which is usually required in reorganizations is seldom required for purposes of mere maintenance or operation or preservation such as under the existing decisions with respect to public utilities are the only purposes for which receiver's certificates[29] may be issued or antecedent claims paid in priority to existing liens.[30] Rather are such new moneys needed to supply working capital or for expenditures which are clearly capital in their nature.

But apart from the question of what the law is, what ought the law be? This is largely a question of economic policy, on which opinions may well differ. It is submitted, however, that it would be most unfortunate if the federal courts should assert such a power as Mr. Rosenberg believes they possess.

If there exists in the federal courts of equity such a power of affirmative compulsion without the aid of statute, it obviously is not dependent for its existence upon the assent of any proportion of the parties affected by its exercise. In other words if, without the aid of statute, a federal court of equity may compel a minority of the holders of an issue of mortgage bonds to accept stock in a reorganized company and not afford to them an opportunity to receive their pro-rata share of the proceeds of the sale of the mortgaged property there exists equal power in the court, in case there is no majority in favor of any plan, to back the plan supported by one of two minorities, and compel its acceptance by the other minority. Indeed under Mr. Rosenberg's theory there exists in the court power to approve a plan promulgated by a minority and force its acceptance by an objecting majority, or going further, to

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[26] *St. Louis Trust Co. et al.* v. *Riley* (C. C. A. 1895) 70 Fed. 32; *Southern Railway* v. *Carnegie Steel Co.* (1900) 176 U. S. 257, 296, 20 Sup. Ct. 347; *Lackawanna etc. Co.* v. *Farmers' Loan & Trust Co.* (1900) 176 U. S. 298, 20 Sup. Ct. 363.

[27] *Crane Co.* v. *Fidelity Trust Co. et al.* (C. C. A. 1916) 238 Fed. 693 (rehearing denied Feb. 13, 1917); *John A. Roebling's Sons Co. of California et al.* v. *Idaho Ry. Light & Power Co. et al.* (C. C. A. 1917) 243 Fed. 527 (rehearing denied Oct. 8, 1917); *Central Trust Co. of New York* v. *Colorado Ry. Light & Power* (D. C. 1912) 200 Fed. 85; *Wood* v. *Guarantee Trust etc. Co., supra,* footnote 25.

[28] *Westinghouse Electric, etc. Co.* v. *Brooklyn Rapid Transit Co.* (D. C., S. D., N. Y., Dec. 31, 1920) Cons. Cause Eq. No. E15-347 (not reported).

[29] *Illinois Steel Co.* v. *Ramsey* (C. C. A. 1910) 176 Fed. 853; *Farmers' Loan & Trust Co.* v. *Burbank Power etc. Co.* (D. C. 1912) 196 Fed. 539.

[30] Cases cited *supra,* footnotes 27, 28.

write its own plan of reorganization and force that plan upon all security holders whether they will or no.

With no intent to disparage in the slightest the high caliber of the men who sit on the federal bench, it is submitted that this is not a power with which they should be vested. The problems of a reorganization are usually business problems rather than purely legal problems. Indeed the function of the lawyer who practices in this field is not so much to tell his clients what plans they *should* adopt as it is to tell them what they *may* do. The development of a sound reorganization plan for any complicated business, whether public utility or industrial, usually involves, besides a knowledge of the relative legal rights of the existing security holders in the properties involved, thorough engineering and financial investigation, for the purpose of a reorganization plan is not so much to settle present litigation as it is to build a sound business structure which can effectively operate in the future for the service of the public and the profit of those whose money is invested in it. Few are the lawyers whose training makes them experts in such matters, and, again without depreciation of the abilities of the bench, the current run of judicial experience in the trial of litigated causes is not calculated to develop such expertness. It is true that there have been judges large in mental grasp who, by the force of their personality and their keenness of judgment, have been able successfully to effect their own plans of reorganization when the parties in interest were unable to agree or had produced a plan which seemed inequitable to the courts, but such judges have been few in number. It is believed that the bench as a whole would be just as unwilling to undertake the vast administrative responsibility which Mr. Rosenberg's theory would impose upon it as the banking community and the bar are unwilling to believe that there exists any such power. In reorganizations, as in other branches of the law, the judiciary should, so far as possible, confine itself to the judicial function, that is, the decision of precise controverted questions of law and fact and the administration of private business by governmental bodies, whether courts or commissions, should be reduced to a minimum.

A discussion which concedes the problem which Mr. Rosenberg presents but rejects his solution would obviously be incomplete without the suggestion of an alternative solution. In substance such an alternative has already been suggested by Mr. Rosenberg in the COLUMBIA LAW REVIEW.[31] Under the bankruptcy power [32] it would be both competent [32a] and wise for Congress to enact legislation based in part upon the composition idea embodied in our present Bankruptcy Act [33] and in part upon the English Companies Act,[34] whereby a plan of reorganization

[31] (1917) 17 COLUMBIA LAW REV. 523.
[32] U. S. Const. Art. I, Sec. 8(4).
[32a] *Canada Southern Ry.* v. *Gebhard* (1883) 109 U. S. 527, 3 Sup. Ct. 363.
[33] (1898) 30 Stat. 549, U. S. Comp. Stat. (1916) § 9596.
[34] St. 8 Edw. VII (1908) c. 69, §§ 129, 182, 199.

assented to by, say, at least three-fourths of the creditors of any class should be binding upon the creditors of that class and such minority should have no rights in the property other than under the plan, unless upon a proceeding brought by one of the dissenting minority within a reasonably short time, say sixty days after the filing of the plan with the court and notice to creditors, the court should find the plan inequitable as to the dissenters. In the absence of such assent by any class of creditors the reorganization should, as against that class, be left to the machinery of the conventional form coupled with that solution of the problem presented by the *Boyd* case which was worked out in the Frisco, the Missouri Pacific and the Chicago and Eastern Illinois reorganizations.

While it is not possible conscientiously to paint for such a plan the picture of reduction of expenses, expedition and accomplishment of absolute equity which has been painted for the other theory, it is believed that it has the advantage of permitting business men to make their own contracts instead of having contracts imposed on them by governmental agencies, and that contracts resulting from the give and take, and indeed litigation, of business men over business problems will prove more satisfactory in the long run, both for the public and for the parties in interest, than contracts written by paternalistic judges however competent and well intentioned they may be.

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